Filed 3/18/09 White v. Indian Oaks CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEVE WHITE, Plaintiff and Appellant, v. INDIAN OAKS, LP, et al., Defendants and Respondents.	B208727 (Los Angeles County Super. Ct. No. SC090246)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Reversed.

Law Offices of Brian D. Witzer, Inc., Brian D. Witzer, Andrew J. Spielberger and Rowena J. Dizon for Plaintiff and Appellant.

Wood, Smith, Henning & Berman, Victoria L. Ersoff and Ranjan A. Lahiri for Defendants and Respondents.

INTRODUCTION

This appeal contests the grant of summary judgment in a personal injury action based upon a tenant's claim of mold infestation in his apartment. The defense successfully moved for summary judgment on the ground that it had no actual or constructive notice of the dangerous condition. We reverse, finding a triable issue of material fact exists on the question of constructive notice.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Complaint*

Plaintiff Steve White's first amended complaint alleges causes of action for negligence and breach of the implied warranty of habitability. He sues the owners and property managers of the apartment building (collectively defendants).[1] He seeks recovery for personal injuries caused by toxic mold.

2. *The Summary Judgment Motion*

Defendants moved for summary judgment on both causes of action on the ground that White could not establish that they "had notice of the alleged defective condition which [he] claim[ed] caused his injuries or that [he] gave defendants any notice of the alleged defective condition during the time that he resided at defendants[']property."

On the issue of notice, the parties presented the following evidence.

White lived in Unit 194 at the Indian Oaks Apartment from January 9, 2004 through April 26, 2005. The complex has over 200 units. Before moving in,

---

[1] The defendants are Indian Oaks, LP (erroneously sued as LA Indian Oaks, LP), AIMCO, LP (erroneously sued as AIMCO-LP, Inc.), OP Property Management, LP, and AIMCO/Indian Oaks Apartments.

White conducted a walk-through inspection of his unit, following which he submitted an inspection report. White noted various defects in the apartment's condition but did not explicitly identify any mold-related issues. However, he did indicate in the report that the "back storage room has water damage." In his deposition, White described the storage area as "connected to the building on the back porch of the living room area." He used it to "stor[e] a few things." He testified that the water damage consisted of "discoloration of the drywall areas; actual holes in the drywall areas; obvious water penetration; stains; physical damage." It smelled "very 'musty,' . . . [a] damp smell." When asked if he saw mold in the area, White replied: "I don't know. I don't recall." Defendants never repaired the water damage to the storage room.

White's written lease included a form two-page "Mold Lease Addendum" (MLA). The MLA recited: "Resident is hereby notified that the premises are subject to the infestation of mold or mildew if not properly maintained. When moldy materials are damaged or disturbed, mold organisms and associated products are released into the air; and some molds produce toxic chemicals, which may contaminate the premises' air space, and exposure to spores can occur through inhalation or direct contact. Resident acknowledges that routine visual inspections for mold growth or signs of water damage and wetness as well as locating sources of mold odors by smell, is the most reliable method for identifying the presence of mold or mildew and should be addressed immediately." The MLA further provided that to prevent any mold infestation, White agreed to 11 specific obligations, including, to "immediately report[] any water intrusion, such as . . . drips or 'sweating' pipes"; to "use bathroom fans . . . while showering or bathing and [to] immediately report to Management any non-working fan"; to conduct a monthly "visual inspection of the premises . . . for the presence of mold growth"; to "immediately report to Management if significant mold growth is noted on

surfaces inside the premises"; and to "circulate fresh air" because "air circulation" is one of "the most important factors in avoiding mold and mildew." The MLA gave defendants the authority to enter White's apartment "to allow for mold investigation and remediation" if they had "knowledge of or reasonably believe[d] that there *may be* mold inside" and to require White to temporarily vacate the premises in those circumstances if necessary. (Italics added.) The MLA recited that White's violation of its provisions constituted "a material violation" of the lease. When White signed the lease (including the MLA), the property manager, Judy Jenks, told him that complaints could be made to her orally or in writing.

Prior to White's occupancy, no one had complained to the property manager or maintenance individuals about either mold contamination or water leaks in Unit 194. Immediately before White moved in, maintenance personnel performed a visual inspection of Unit 194 and found no evidence of mold contamination.

Unit 194 is on the second floor of a two-story structure. It has two bedrooms and two bathrooms. The master bathroom is inside the master bedroom. It is immediately below the roof and includes a shower/bathtub enclosure. White used it on a daily basis. He normally kept the bathroom door closed when he took a shower. The master bathroom has no windows but has a fan which automatically goes on when the light switch is activated.

After living in the apartment for two months, White noticed that "water [was] collecting on the ceiling of the master bathroom." White also noticed dark red stains on the ceiling in the master bathroom. He assumed "it was mildew of some sort; just the water evaporating and leaving some sort of residue behind." He told Jenks "about the water on the walls that would drip down and the moisture collection," "that the walls would – like sweat" and that "[d]uring a hot shower, the ceiling would have droplets of water you could visibly see, and . . . that the walls would have like sweat going down them." However, White did not tell Jenks (or

anyone else employed by defendants) about the red stains on the ceiling. Jenks told him to "try to keep the windows open."

White also told Jenks that the fan was inefficient and loud. She responded that the situation "was somewhat normal for the design of those fans." White inspected the fan and confirmed that it was working.

White responded to the situation by scrubbing, on a monthly basis, the walls and the ceiling with bleach. The red spots would return within a day or two after he scrubbed. In addition, White observed that if he did not scrub regularly, "eventually little black spots would show" "in the recesses of the ceiling, where the texture was." White assumed the black spots were "just the mildew from showering and the water collection." White scrubbed the black spots about once a month but they would return in three weeks. White never told Jenks about the black spots.

At some undesignated time, a water pipe burst in the adjoining apartment, Unit 196. The accident did not cause any visible damage to White's unit but White did notify Jenks "that there was some sort of – kind of a shower-like smell, and . . . asked her to make sure that [his] apartment was okay." Jenks never inspected or had anyone inspect White's apartment. She "just told [him] that . . . they had large fans in [Unit 196]." (White's neighbor in Unit 196 never told him that she had a mold problem after the water pipe burst.)

Within two months of moving in, White began to "suffer[] from persistent colds and . . . a lack of energy." In January 2005, White was hospitalized. Surgery was performed to remove abscesses from his nose and eye. After the surgery, White's mother told him that she had "stopped by his apartment and noticed 'mold' on the ceiling of the Master Bathroom." This was the first time that White "heard the term 'mold' being used in reference to his apartment."

White's mother hired Forensic Analytical to conduct a mold investigation on February 16, 2005. Its report concluded: "Mold growth reservoirs are present at the master bathroom ceiling. This conclusion is supported by the presence of visible mold growth . . . and evidence of water streaking along all walls. It appears that this moisture intrusion is related to elevated ambient humidity during shower use due to inadequate ventilation from the ceiling fan." White never forwarded Forensic Analytical's report to defendants and never discussed it with any of defendants' employees.

In March 2005, White gave defendants written notice that he would move out on April 24, 2005. The notice contained no reference to mold contamination in the apartment. Before he vacated the premises, White hired Sherlock Healthy Homes to conduct an inspection for mold. The inspection occurred on April 18, 2005 and consisted of various tests. Mold growth was found[2] and the source of the problem was identified as "poor ventilation in bathrooms." Remediation was recommended.

In April 2005, White, upon surrendering his apartment, told Jenks for the first time about the mold in Unit 194.

White submitted a declaration that reiterated the complaints he had made to Jenks with an explanation of his intent. He averred that he had told her about the "water collecting on the ceiling and walls in [the] master bathroom" and the "inefficient" and "loud" fans in the master bathroom so that defendants would "inspect or fix the problem[s.]"

---

[2] The report stated that mold had been found in "the master bedroom ceiling cavity" and that there was "excess moisture in the ceiling around the fan in the master bedroom." It also found mold "inside the bathroom toilet." Given that White's position, both in the trial court and on appeal, is that the mold growth was centered in the master bathroom, it is not clear whether these references to the master *bed*room are typographical errors.

3. *White's Opposition to Summary Judgment*

White's opposition to defendants' motion for summary judgment advanced two arguments.

First, White essentially conceded that he had not given defendants actual notice of mold infestation but, nonetheless, urged that there was a triable issue of material fact whether his complaints resulted in defendants having *constructive* notice of the defects which caused his injuries. In that regard, White relied primarily upon the evidence set forth above in the discussion of defendants' summary judgment motion. In addition, he produced a copy of a lengthy manual that defendants distribute to their employees that sets forth the policy and procedure for addressing moisture control and mold management.[3] The manual's introduction explains that "mold can occur indoors in areas where building materials, like fiberboard or gypsum board (sheet rock), become moist or water-damaged due to excessive humidity, chronic leaks, condensation, water infiltration or flooding." White also tendered a declaration from Andrew Puccetti, a certified industrial hygienist, who explained: "Mold needs water to grow. Mold flourishes in poorly ventilated wet indoor areas. Mold loves to eat cellulose product such as drywall paper." Lastly, a declaration from Richard Snyder, an expert in residential property management and maintenance, averred that defendants "breached the standard of care in the property management and landlord industry by not following up" on any of White's complaints to Jenks.

From this record, White argued: "Plaintiff did notify defendant about water collecting on the ceiling and walls of his master bathroom. Plaintiff did notify

---

[3] The copy of the manual tendered is dated January 10, 2005.

defendant that the fan in the master bathroom was inefficient. Plaintiff did notify defendant that there was a smell in his master bathroom after a flood next door. These notifications were done as requests so that defendant would inspect these issues in the master bathroom. Defendant knew of the mold dangers from water intrusion. If defendant had conducted a reasonable inspection of the bathroom then defendant would have seen the moldy stains on the ceiling of the bathroom which constitutes constructive notice."

White's second argument to defeat summary judgment was that notice (actual or constructive) was not required because defendants had created the dangerous condition that caused the mold. (See, e.g., *Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798.) In that regard, White urged that defects on the roof created by defendants led to water intrusion and mold growth. Deposition testimony of Michael Drury, the maintenance supervisor at White's building, explained that when the air conditioning units on the roof were remounted six to 18 months before White moved in, "[m]ost of" "the old holes from where they were mounted prior" "were never sealed correctly." These holes caused water leakage into the units. Defendants never initiated preventive maintenance but, instead, waited for an individual tenant to complain before fixing a particular area. There were also roof leaks caused by defective flashing which were also only addressed when a tenant complained. John Premo, a licensed roofing contractor, reviewed Drury's deposition testimony and inspected the interior of White's (former) apartment as well as the building roof immediately above the unit. Based upon that, Premo submitted a declaration which concluded: "There are defects on the roof which led to water intrusion into [White's] apartment. The defects are a failure to seal holes from the old air conditioning units on the roof, a failure to properly flash areas of sheet metal on the roof and a failure to properly seal ventilation pipes and electrical outlets and equipment on the roof. Based upon my review of Mr. Drury's

deposition, these roofing defects were created by a company hired by defendant approximately six months to a year before [White] moved into his apartment."

4. *The Trial Court's Ruling*

The trial court granted defendants' summary judgment motion. It concluded: "[T]he evidence is legally insufficient to raise a triable issue of material fact regarding: (1) whether defendants had actual or constructive notice [of] any uninhabitable or dangerous condition in [White's] former apartment; or (2) whether any dangerous or defective condition was created by reason of defendants' negligence such that knowledge can be imputed to defendants."[4]

White's appeal follows.

DISCUSSION

The principles governing appellate review of a grant of summary judgment are well-settled. We conduct a de novo review. The moving parties' evidence is strictly construed whereas the evidence offered by the party opposing summary

---

[4] At the first of two hearings conducted on the summary judgment motion, the trial court indicated it would grant the motion. After hearing argument, the court agreed to let the parties present additional written argument and to set the matter for a second hearing. Thereafter, each side submitted a supplemental brief addressing whether the evidence established a triable issue of material fact. However, defendants also presented additional evidence in an attempt to establish that the roofing work which White claimed had caused the leaks occurred before they owned or managed the building so that "there is no triable issue of material fact that any defect was created by an agent of defendants."

Immediately prior to the second hearing on the summary judgment motion, the trial court posted a tentative ruling to grant the motion. At the hearing, White objected to defendants' presentation of additional evidence and asked that it be "excluded." The trial court ruled: "I didn't rely on it, but I will not strike it either." We therefore did not include this evidence in our statement of facts, even though defendants' brief makes multiple references to it.

judgment (here, White) is liberally construed to determine whether a triable issue of material fact exists. A triable issue of material fact exists if the evidence so viewed would allow a reasonable trier of fact to find in favor of the opponent. All doubts are to be resolved in favor the party opposing summary judgment. (*Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 9.)

White's lawsuit alleges causes of action for breach of the implied warranty of habitability and negligence. The two theories are essentially co-extensive for purposes of this appeal. Under the implied warrant of habitability, "a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 637.) "The tenant . . . reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, *of which the landlord has actual or constructive knowledge notice*, that arise during the tenancy and render the dwelling uninhabitable." (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1205, italics added.) A landlord's liability for breach of the implied warranty of habitability is governed by a negligence standard. (*Id*. at pp. 1205-1206, fn. 11.) The fundamental negligence principle, set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, is that "the landlord owes a tenant a duty of reasonable care in providing *and maintaining* the rented premises in a safe condition. [Citations.]" (*Becker v. IRM Corp.* (1985) 38 Cal.3d 454, 467, italics added, disapproved on another ground in *Peterson v. Superior Court, supra,* 10 Cal.4th at p. 1210.) In that regard, "'"[t]he landlord's lack of knowledge of the dangerous condition is not a defense. He has an *affirmative duty* to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must *inspect* them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable."'" (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134.)

In this case, it is undisputed that White never explicitly informed defendants during his tenancy about the mold in his apartment. But that does not resolve the matter. If defendants had constructive notice of circumstances reasonably requiring an inspection, and would have discovered the dangerous conditions by such inspection, defendants can be liable. Civil Code section 19 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Here, White told Jenks, defendant's property manager, "about the water on the [bathroom] walls that would drip down and the moisture collection"; "that the walls would – like sweat" and that "[d]uring a hot shower, the ceiling would have droplets of water you could visibly see, and . . . that the walls would have like sweat going down them." In addition, White told Jenks that the fan in the master bathroom was inefficient. While it is true that White made no explicit reference to mold or even to the red and black spots he saw growing in the master bathroom, his conversation with Jenks did not take place in a vacuum. It occurred in the context of a leasehold estate where defendants were well aware that the premises were subject to mold infestation if not properly maintained. With that knowledge, defendants required White to sign the MLA which imposed upon White, among other things, the duty to report "any water intrusion, such as . . . drips or 'sweating' pipes" and to report "any non-working fan" as part of a protocol to prevent mold infestation. Defendants considered White's duty to report these events so significant that a failure to do so would constitute a material violation of the lease agreement. Further, defendants had the express authority to inspect and correct for mold: the MLA provided that if defendants "reasonably believe[d] that there *may be* mold inside the Premises," they could require White to temporarily vacate, if necessary, to investigate and remediate. (Italics added.) We therefore reject

defendants' argument that that White "has failed to make any connection between these alleged complaints and any mold that was in his unit [and] that any of these non-mold related complaints are material to any issue of mold in his unit."

Hence, we are confronted with a situation in which: (1) a landlord knows about the potential of mold infestation; (2) the landlord requires the tenant to monitor his apartment and to report conditions that can lead to the growth of mold; and (3) the tenant reports some of those very conditions such as the presence of a large amount of water on the bathroom walls, the water's failure to quickly dissipate, and ineffective ventilation. Viewed in this context, we conclude that the evidence creates a triable issue of material fact whether defendants' actual notice of certain conditions in the apartment (conditions that defendants' lease associated with mold growth)[5] gave defendants constructive notice of the reasonable potential for mold growth in White's apartment. Stated another way, a reasonable jury could infer from this evidence that: (1) White sufficiently informed defendants of the precursors of mold infestation so that defendants had a duty to inspect and (2) if defendants had conducted a reasonable investigation, they would have discovered the condition (including the red and black growths in the master bathroom) which became a widespread mold infestation. (See *Daitch v. Naman* (2006) 807 N.Y.S.2d 95, 96 [triable issue exists whether mold was a foreseeable consequence of water and particulate matter that entered the plaintiff's apartment during exterior construction work] and *Litwack v. Plaza Realty Investors, Inc.*, *supra*, 835 N.Y.S.2d at p. 153 (dis. opn. of Saxe, J.) ["[T]he question is not

---

[5] Defendants' knowledge (as demonstrated by its execution of the MLA and its internal policy manual about mold management) that these conditions are clearly associated with mold growth and infestation distinguish this case from the out-of-state authorities upon which defendants rely. (See, e.g., *Litwack v. Plaza Realty Investors, Inc.* (2007) 835 N.Y.S.2d 151 and *Beck v. J.J.A. Holding Corp.* (2004) 785 N.Y.S.2d 424.)

whether defendants had notice of the mold condition itself, but whether defendants had notice of a condition on the premises, namely, ongoing and persistent water leaks, from which it was foreseeable that a hazardous mold condition would result" and "Evidence of defendants' knowledge of ongoing water leak problems [including wetness on a wall and a growing brown discolored spot] was enough to create a question of fact as to whether defendants had notice of the potential for the mold growth that allegedly caused plaintiff's injuries."].)[6]

[6] In light of our analysis, there is no need to discuss the second part of the trial court's ruling: no triable issue of material fact existed that defendants created the dangerous condition which caused the injuries. Defendants' summary judgment motion raised only one ground: they had no actual or constructive notice of the dangerous condition. Further, their respondents' brief states that "[t]he central issue in this appeal is whether [White] presented sufficient evidence to establish any triable issue of material fact as to whether [defendants] had actual or constructive notice of mold in his unit." As explained above, the trial court erred in ruling in favor of defendants on this point. Reversal renders moot any consideration of White's alternative theory to oppose summary judgment (notice was not required because defendants had created the dangerous condition) and the trial court's ruling on it. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

DISPOSITION

The judgment is reversed. Appellant White is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.